

# N.W. Bernstein & Associates, LLC

800 Westchester Avenue, Suite N319 · Rye Brook, New York 10573 · (914) 358-3500 · Fax: (914) 701-0707

---

May 19, 2019

*Via Electronic Mail & Federal Express*

Richard J. Hackley, Chief  
Program Accounting and Analysis Section  
United States Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Thomas J. Krueger  
Associate Regional Counsel  
United States Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Matthew Ohl  
Remedial Project Manager  
United States Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Re: Effort to Resolve Informally a Dispute Regarding EPA's Bill for Third Site Costs for  
the period November 6, 2016 through November 5, 2017

Dear Mr. Hackley, Mr. Krueger and Mr. Ohl:

This letter provides further response to Mr. Thomas J. Krueger's letters of May 20, 2019, July 22, 2019 and April 21, 2020 (Exhibits 1, 2 & 3) with regard to costs incurred by the United States Army Corps of Engineers (Army Corps) during the March and June 2017 routine sampling events at Third Site for which the United States Environmental Protection Agency Staff ("EPA Staff") billed to the Third Site Trust Fund ("Trust") in Bill Number 2751926S0022. (Exhibit 4). This is an effort to resolve the dispute over these costs informally pursuant to Section VIII of the 2002 Third Site Administrative Order on Consent (the "Consent Order").

## Background

Pursuant to the Consent Order, the EPA may bill the Trust on an annual basis for its oversight costs. (Consent Order, § VII (E)). EPA Region 5 Acting Director Douglas Ballotti's Written Decision of May 3, 2018 clarified what does, and what does not, constitute billable "oversight costs":

“Oversight costs” are all costs . . . that the United States incurs in reviewing or developing plans, reports and other items pursuant to this order. “Other items” are like plans and reports: documents. . . The costs incurred in preparing annual Itemized Cost Summaries for this Site . . . are “oversight costs.” . . The costs incurred preparing reports about field observations are “oversight costs.” The costs incurred in the field observing work and providing supervision are not “oversight costs.” The costs incurred to travel to or from the Site are not “oversight costs.”

(Exhibit 5, Written Decision for the Dispute Resolution Regarding EPA’s Bills for Third Site Costs, May 3, 2018).

In 2016, the Trust and EPA Staff (collectively “the Parties”) negotiated an amendment to the 2002 Consent Order which authorized the use of Electrical Resistance Heating (“ERH”) to treat Third Site. (Exhibit 6, December 12, 2016 Amendment to the Third Site Consent Order). The Amendment created an exception to the general rule that EPA is not entitled to recover costs for field work by expanding the definition of “oversight costs” to include “ERH-related costs not inconsistent with the NCP.” *Id.* ¶3.

The sole question in this dispute is whether the field work and related travel expenses incurred by the United States in overseeing the routine sampling events in March and June 2017 fall within the exception for “ERH-related” work. The Trust’s position, previously communicated in letters dated March 18, 2019, July 9, 2019, and August 26, 2019 (Exhibits 7, 8 & 9), is that field oversight of routine quarterly monitoring associated with the pump and treat system does not fall within the exception for ERH-related work, and therefore may not be charged to the Trust. EPA Staff’s position is that the Army Corp’s field work during March and June 2017 was also intended to be used for determining the baseline for ERH, and therefore falls within the “ERH-related” exception.

In an attempt to put this matter to bed without the use of formal dispute resolution, the following is a detailed account of how baselines were determined for the ERH remedy, the sampling events at issue, and the Army Corp’s involvement in those events.

#### The March 2017 Sampling Event

In support of its position, EPA Staff relies upon the Remedial Design Report prepared by McMillan-McGee Corp. for the Trust dated April 23, 2018. (“Remedial Design” or “Final Remedial Design”) (Exhibit 10). EPA Staff asserts in its letter of April 21, 2020 that “[s]ections 1.5.2 and 3.7 of the Trustees’ ERH Remedial Design state that the March 2017 groundwater monitoring results would be used to provide baseline data important to monitoring the progress and impacts of the ERH system.” (Exhibit 3). As

shown below, that is not an inaccurate reading of the Remedial Design. The main ERH area was the sheetpile enclosed DNAPL area. Late in the process, a small additional treatment area adjacent to and just outside the main DNAPL area was added (called the ATT area).

#### Sections 1.5.2. Remedial Goals DNAPL Area

Section 1.5.2 of the Remedial Design states that for the DNAPL area, the baseline for ERH is the baseline data collected January 2005:

Treatment of the DNAPL Area will be considered complete when the total VOC groundwater concentration in the DNAPL Area is less than or equal to 4,285 micrograms per liter ( $\mu\text{g/L}$ ), the value that is equal to 10% of the baseline total VOC groundwater concentration measured in January 2005 and reported to EPA in February 2005.

(Exhibit 10, §1.5.2, ¶ 2). The January 2005 data was selected because that sampling was specifically conducted after installation of the sheet pile wall in late 2004 in order to establish the baseline and clarify remedial objectives within the DNAPL Containment Area. (Exhibit 10, §§ 1.5.2 fn1, 13, & 14; Exhibit 11, Supplemental Data Collection Plan DNAPL Containment Area-Revision 1, Dec. 19, 2013). This 2005-established baseline has been the reference for all prior treatments of the DNAPL Containment Area, and continues to the baseline for this area today. The March 2017 sampling has no connection to the DNAPL Containment Area baseline.

#### Sections 1.5.2. Remedial Goals ATT Area

In connection with the ATT Area, § 1.5.2 reads:

Reduction in total VOC groundwater concentration for the ATT Area is to be measured through the collection of groundwater samples from monitoring well MW-27R. Contaminant of concern laboratory analytical results for this well are to be summed to calculate total VOC concentration in groundwater at the location. Treatment of the ATT Area will be considered complete when the total VOC groundwater concentration in monitoring well MW-27R is less than or equal to 742  $\mu\text{g/L}$ , the value that is equal to 10% of the baseline total VOC groundwater measured in March 2017 and reported to EPA in the April 2017 Monthly Progress Report for Third Site.

(Exhibit 10, § 1.5.2). Footnote 2 to § 1.5.2 further clarifies that *only* the data from MW-27R is relevant to the ATT Area baseline. “[T]he 90% reduction criteria will be based on groundwater sample total VOC analysis for monitoring well MW-27R, performed on March 22, 2017.” (*Id.* fn2).

Although one of the wells sampled during the March 2017 sampling event, MW-27R, was

eventually used as a reference for the ATT Area baseline, it does not follow that the March 2017 sampling was ERH-related. MW-27R was only one of the 24 sampling points tested in March 2017 during the three day routine quarterly monitoring event. The overwhelming bulk of the work had absolutely nothing to do with MW-27R. Furthermore, the Army Corps literally did not oversee the sampling of MW-27R. Field notes show that the Army Corp representative left Third Site 40 minutes prior to MW-27R being sampled. (Exhibit 13, p. 3).

Monthly Progress Reports submitted to EPA offer additional proof that the Army Corp's presence at Third Site was not ERH-related. The March 2017 report simply stated that "quarterly groundwater and surface water sampling was conducted during the week of March 20." (Exhibit 14, p.1). There was no mention of the Army Corps or ERH in connection with that routine quarterly sampling event. *Id.* Likewise, there is no reference at all to ERH in the description of the March data reported to EPA in the April 2017 Progress Report. (Exhibit 23). The data was discussed in the first bullet at the top of the second page and described as "pump-and-treat progress monitoring" data and data "from the individual pump-and-treat extraction wells." *Id.* p. 2. The cover sheet to the data is entitled "Pump-and-Treat Progress Monitoring Data." *Id.* p. 15. EPA accepted the reports including the characterization of the data without objection.

The Army Corps own records are consistent with the April 2017 Monthly Report's characterization: "Provided field oversight of the Spring 2017 water sampling event" and "Reviewed vegetation clearing operations along fence line while at site." (Exhibit 13a). There is no reference at all to ERH.

Finally, as of March 2017, establishing an ERH baseline using the March 2017 MW-27R data had not even been contemplated. For example, Section 1.5.2 of the March 2017 draft Remedial Design Report did not cite the March 2017 data – it only referenced the January 2005 data in connection with establishing a baseline. (Exhibit 12, 90% Remedial Design Report dated March 22, 2017 (the "Draft Remedial Design")). MW-27R data appeared in the Final Remedial Design one year later, in April 2018. (Exhibit 10, § 1.5.2).

### Sections 3.7. Remedial Goals DNAPL and ATT Areas

Contrary to EPA Staff's assertion, § 3.7 of the Design Report makes it clear that that no new sampling was planned to establish a baseline for ERH in both the DNAPL Containment Area and the ATT Area:

*No groundwater sampling is proposed prior to ERH treatment, as the baseline has been established for the remedial goal of a 90% reduction in the concentration of contaminants of concern in groundwater, and the remedial goals are not related to soil concentrations. For sampling results that establish the remedial goals in the DNAPL Area, refer to Tables 1 and 2 of Memorandum dated Feb 19, 2008, "In Situ*

Chemical Oxidation Confirmatory Ground Water Sampling - DNAPL Containment Area” (Environ 2008A). For comparison to more recent groundwater sampling results in the DNAPL Area, refer to Table 4 of “Monthly Progress Report – June 2013” (Environ 2013B). For the ATT Area, refer to Table 2 of Ramboll April 2017 Monthly Progress Report (Ramboll 2017) for baseline total VOC groundwater concentration in monitoring well MW-27R.

(Exhibit 10, Design Report § 3.7, ¶ 4, emphasis added). The reference to the April 2017 Monthly Progress Report is a reference to the March 22, 2017 sampling of MW-27R discussed above, and *not* attended by the Army Corps. Also note that § 3.7 of the Draft Remedial Design did not cite the March 2017 sampling. (Exhibit 12, § 3.7). This language was added after the sampling event had taken place, similar to the addition in § 1.5.3.

#### The June 2017 Sampling<sup>1</sup>

With regard to the June 2017 Sampling, EPA Staff claims that “[w]hen the startup of the ERH system was subsequently delayed, the Trustees agreed that the June 2017 groundwater sampling would instead provide the baseline for evaluating ERH impacts (which they confirmed in a September 26, 2017 response to comments).” (Exhibit 3, p.1). After an extensive search, no connection between the June 2017 Sampling and ERH was identified in the comments or elsewhere. In fact, a detailed review of the comments show that the June 2017 sampling was never mentioned. All comments made by the Parties in connection with the ERH design are attached hereto as Exhibit 15, EPA Staff’s initial comments on May 8, 2017; Exhibit 16, The Trust’s June 4, 2017 response to EPA Staff’s comments of May 8, 2017; Exhibit 17, EPA Staff’s August 3, 2017 comments on the Trust’s June 4, 2017 response; and Exhibit 18, the Trust’s final response to EPA Staff’s comments dated September 15, 2017.<sup>2</sup>

#### Section 1.5.2 Comments

With regard to Section 1.5.2, EPA Staff first directed the Trust to “[i]nclude a discussion and Table in the “Remedial Goals” section to identify the specific 90% remedial goals for the subject treatment areas, and each subject contaminant. The remedial goals should specifically address the requirements specified in Third Site’s “Enforcement Action Memorandum,” dated 11 May 2001.” (Exhibit 15, p.3 comment 6). McMillan McGee Corp. responded to this comment by revising the section to clarify that the January 2005 baseline sampling data was to be used for the

---

<sup>1</sup> Similar to the March field oversight work, the Army Corps’ description for its June 1, 2017 through July 3, 2017 on-site work as: “Coordinated field oversight activities with USACE Indianapolis office” and “Field oversight of June 2017 Surface Water and Water Sampling Event.” (Exhibit 13b). Once again there is no reference to ERH.

<sup>2</sup> The Staff cites to comments made September 26, 2017. However, the Trust’s final comments were made September 15, 2017. The Trust requested the referenced September 26, 2017 comments, but did not receive a reply. (Exhibit 9, p.2).

DNAPL Area, and the March 22, 2017 MW-27R data would serve as the baseline for the ATT Area. (Exhibit 16, p. 2-3 comment 6). EPA Staff then requested that a table of performance standards for the ERH treatment be included in the work plan “so all parties are clear on what ERH is expected to do.” (Exhibit 17, p. 1 comment 6). The Trust agreed to add the Table (Ex. 18), which became Table 5: Performance Standards for ERH Treatment in Remedial Design. (Exhibit 10 at p. 11-12. Table 5 makes it crystal clear that the January 2005 data was the baseline for the DNAPL area, and the March 2017 MW-27R data established the baseline for the ATT Area:

Table 5: Performance Standards for ERH Treatment

Treatment Area	Sampling Location	Measurement	Performance Goal
DNAPL Area	Sump, P-1, P-2, and P-3 Wells	Total VOC Concentration in Groundwater	4,285 µg/L
ATT Area	MW-27R Monitoring Well	Total VOC Concentration in Groundwater	742 µg/L

(Exhibit 10, Table 5, pp. 11-12). The Section 1.5.2 Comments and Table 5 prove the June 2017 sampling is not related to ERH performance.

### Section 3.7 Comments

With regard to Section 3.7, EPA Staff initially commented that “[it] would seem that some baseline sampling of soil and/or groundwater during drilling would be helpful to assess ultimate removal. Please consider sampling in select but representative locations/depths.” (Exhibit 15, p.3, comment 11). In response, the Trust modified Section 3.7 to explain that sampling in connection with ERH was not necessary, as the baseline was already established. “No additional sampling is proposed prior to ERH treatment, as the baseline has been established.” (Exhibit 16, p.4, comment 11). EPA Staff responded by email on August 3, 2017, again arguing in favor of additional baseline sampling: “A baseline sampling is necessary before the thermal treatment begins. If thermal treatment begins immediately following a regular scheduled water sampling event, then the data obtained during the sampling event should satisfy this request regarding groundwater. Soil samples can be collected from the borings that will be completed.” (Exhibit 17, p.2, comment 11).

Prior to responding to EPA Staff’s August 3, 2017 comments, the Trust proposed a conference call, which went forward on August 10, 2017 at 2PM. (Exhibit 19). EPA Staff, the Trust and the Trust’s contractors discussed EPA Staff’s comments on the Design Report. In a follow-up email to the EPA Staff, Trustee Norman Bernstein provided a written explanation of why the 2005 baseline sampling was appropriate for the DNAPL Area, and no new baseline sampling

was needed. (Exhibit 20).

A compromise was reached, where the parties agreed to *reference* the June 2013 sampling results in §3.7 in connection with the DNAPL baseline. The Trust's final comments on this section were the following:

This comment has been discussed with EPA and it is agreed the more recent groundwater sampling activity in June 2013<sup>3</sup> provides adequate information for initial conditions of ERH treatment. Reference to the June 2013 sampling results is now included in Remedial Design Report §3.7. It is also agreed that soil sampling is not necessary as soil concentrations are not ERH performance criteria.

(Exhibit 18, p.6, comment 11). Consistent with the Trust's comments, the Design Report says:

No groundwater sampling is proposed prior to ERH treatment, as the baseline has been established...For sampling results that establish the remedial goals in the DNAPL Area, refer to Tables 1 and 2 of Memorandum dated Feb 19, 2008. . . For comparison to more recent groundwater sampling results in the DNAPL Area, refer to Table 4 of "Monthly Progress Report – June 2013" (Environ 2013B). For the ATT Area, refer to Table 2 of Ramboll April 2017 Monthly Progress Report (Ramboll 2017) for baseline total VOC groundwater concentration in monitoring well MW-27R.

(Exhibit 10, §3.7). Once again, in the comments and related correspondence, the June 2017 data was not considered.<sup>4</sup>

#### EPA Staff's New Argument Regarding All sampling

EPA Staff now adds an additional argument at the ends of its letter of April 21, 2020: "The 24 monitoring locations ring the DNAPL containment area where ERH was later applied, so that the sampling results provide a comprehensive baseline to help measure the nature and extent of upgradient and downgradient impacts of the ERH system." The 24 monitoring locations are scattered all over Site and do not "ring" "the DNAPL containment area".<sup>5</sup>

---

<sup>3</sup> The Staff may have confused the June 2013 sampling with the June 2017 sampling.

<sup>4</sup> Further evidence that the June 2017 sampling is not ERH related is shown in the July 2017 Field Notes (Exhibit 21) and the June 2017 Monthly Progress Report (Exhibit 22). Both documents show that the reason the Army Corps and its contractor were on site sampling every location that they sampled was for a 1,2 Dioxane investigation.

<sup>5</sup> Since there is no evidence that the main ERH area (the sheetpile enclosed DNAPL containment area) has any impact on groundwater "upgradient or downgradient" of the sheetpile enclosed DNAPL containment area, perhaps what Staff is really referring to is not the DNAPL containment area at all but to the small ATT area monitored by a single well (MW-27R) located just outside the DNAPL containment area.

Under EPA Staff's rationale, any data gathered from monitoring the pump and treat system anywhere on the Site "upgradient or downgradient" of MW-27R could retroactively become ERH-related oversight costs and therefore recoverable under the December 1, 2016 Amendment. That is not a reasonable interpretation of the December 12, 2016 Amendment to the Third Site Consent Order. While hypothetically all data gathered anywhere on Site "upgradient or downgradient" could be useful to some extent in evaluating the condition of the Site in general, the reality is that the baselines for ERH were established from very specific data. *See* Exhibit 10, Table 5, also reproduced above on p. 6 of this letter.

The EPA approved Design Report states quite clearly: "Reduction in total VOC groundwater concentration for the ATT Area is to be measured through the collection of groundwater samples from monitoring well MW-27R. Contaminant of concern laboratory analytical results for this well are to be summed to calculate total VOC concentration in groundwater at the location." For the ATT Area, the *only* data used for the baseline is from MW-27R collected March 2017. (The reasons why even the March 2017 MW-27R sampling does not qualify for the ERH-related oversight costs exception are discussed above.) For the DNAPL Area itself, the baseline has always been the 2005 baseline sampling data, and has nothing at all to do with the March or June 2017 sampling. The data from 24 Site-wide monitoring wells "upgradient or downgradient" are not "ERH-related costs" and are not within the December 2016 Amendment .

I hope this detailed explanation and the attachments hereto resolve this dispute without the need for formal dispute resolution.

Very truly yours,

*/s/ Mary E. Desmond*

Mary E. Desmond

cc: Peter M. Racher, Trustee